IN THE MATTER OF LICENSE NOS. 92051, 92479, and 92480 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: RICHARD H. VIGILANT

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1887

RICHARD H. VIGILANT

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 29 January 1971, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for three months outright plus three months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as operator of MV TRITON II under authority of one of the licenses above captioned, on or about 22 August 1970, Appellant:

> (1) wrongfully allowed the vessel to be navigated by an unlicensed operator without supervision while the vessel was at sea and carrying passengers, and
>
> (2) wrongfully used foul and abusive language to passengers on the vessel.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of several witnesses.

In defense, Appellant offered no evidence.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to appellant for a period of three months outright plus three months on twelve months' probation.

The entire decision was served on 6 February 1971. Appeal was timely filed on 2 March 1971. Although Appellant had until 2 June

1971 to add to his original notice of appeal, he has not done so.

FINDINGS OF FACT

On 22 August 1970, Appellant was serving as operator of MV TRITON II and acting under authority of his license.

TRITON II is a vessel of 23 gross and 16 net tons, certificated under the conditions of the voyage in question to operate in the carriage of thirty or less passengers with a crew of one licensed ocean operator and one deckhand. The vessel is limited to operation of not more than twelve hours under these conditions.

Appellant is the owner of the vessel. On the date in question he was the only licensed operator aboard. His deckhand held no license.

At about 0630 of 22 August 1970, Appellant boarded TRITON II at Montauk, N. Y. (The record does not establish whether the vessel was in Lake Montauk or in Fort Pond, but the matter does not raise a controlling issue.) A party of seven to nine paid passengers, one of whom had charted the vessel for the day, was on board. While Appellant talked with the party the deckhand piloted the vessel out of the harbor. The vessel cleared the harbor at about 0715. At this time Appellant went to the wheelhouse and lay down on the deck in the immediate proximity of the deckhand who was handling the wheel. At some time en route to the fishing grounds Appellant tended to the placement of fishing lines on the main deck, after which he again lay down as he had before. At about 0930 when the first fish was hooked Appellant came down to the main deck to help in boarding the fish. After this Appellant returned to his former position, lying next to the deckhand in the wheelhouse, until about 1300 at which time Appellant undertook active handling of the vessel.

On two occasions during this voyage Appellant addressed remarks to two of his passengers, the remarks each containing a seven letter participle based on a four letter Anglo-Saxon monosyllable meaning "to have sexual intercourse with."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the delay between the original date set for hearing and the date of decision resulted in a hardship because the suspension ordered hit him during an operating season.

APPEARANCE: Appellant, pro se.

OPINION

I

the first specification found proved in this case arouses some misgivings. It has been held by the Examiner that Appellant permitted the vessel to be operated by an unlicensed operator without supervision while the vessel was carrying passengers at sea, and that this constituted misconduct. There are many factors that enter the evaluation of this judgement.

First, it is noted that the Examiner dismissed as not proved by the requisite evidence an allegation that Appellant was intoxicated on the occasion in question. I would have little hesitancy in holding intoxication under the circumstances existing to be misconduct. But the Examiner also specifically rejected evidence tending to prove that Appellant was asleep on the deck of the vessel's wheelhouse during certain periods of time. The Examiner did state:

"Although I do not conclude on the evidence in this record that the respondent was in fact asleep while he was lying on the deck . . . he was in a condition of repose under circumstances which might readily induce sleep." In reviewing this statement I disregard the Examiner's earlier statement that during these periods "Respondent had his eyes closed and his body was relatively still." If that evidence was not enough to justify an inference that Appellant was in fact asleep I cannot admit a coloration by inference of a finding that the evidence did not prove a condition of sleep to the effect that possibly Appellant was asleep.

If Appellant were asleep under the conditions established, misconduct could be upheld. But it cannot be found, on review of the record, that Appellant was even at any time asleep.

In reaching his holding that Appellant was guilty of misconduct by lying down on the deck under the circumstances of this case, the Examiner relies on and cites from Decision on Appeal No. 1126 where an officer on watch on a vessel in port was held to be guilty of misconduct by reason of being in his room lying on a settee in a position readily inducive of sleep.

There are some distinctions which must be explored. The officer in question in No. 1126 had a definite watch to stand, eight hours, on a vessel of the standard size of those engaged in ocean-going foreign trade. While it was acknowledged in No. 1126 that it was not proved that the person was asleep, it must be

recognized that there is a difference between the condition of a watch-stander, as customarily understood aboard large seagoing vessels, and an operator of a motorboat. No. 1126 recognized that the person's eight hour watch must be stood in such a fashion that the person must be in a "reasonably alert condition and to be prepared to meet emergencies which might arise." In that case it was held that retiring to one's room and reclining on a settee in a position conducive to sleep fell short of the requirement for a reasonably alert condition prepared to meet emergencies which might arise.

In the instant case some confusion arises because of the wording of the certificate of inspection issued to the vessel. The certificate calls for the vessel to be manned, for a voyage of the type found in this case, by a licensed ocean operator and a deckhand. The certificate also limits the operation of the vessel to no more than twelve hours in any twenty four hour period. The Examiner construes this as both limitation on the function of the operator and the imposition of a duty on the operator.

I must point out here that the concept of the eight hour day set up in 46 U.S.C. 673 does not apply to the vessel in the instant case for two reasons. The most obvious one is that the vessel is of 100 tons or less. The second is that the law does not purport to regulate the working time of a master.

The question then is of what obligation the permission to operate a vessel for a period of twelve hours with only one licensed operator aboard imposes upon the operator. Neither the law, the regulations, nor the certificate of inspection requires that a vessel be "under the direction and control" of an operator as 46 U.S.C. 364 required as to pilotage.

Neither the Motorboat act of 1940 nor the Small Passenger Carrying Vessel Act (46 U.S.C. 526 et seq. and 46 U.S.C. 390 et seq.) contemplates that the actual operation of the vessel must be by a licensed person at all times. Here I must make an obvious distinction. To be in charge of a watch on the ordinarily considered ocean-going ship is a condition carrying with a long tradition of duty. The watch officer of such a vessel is not expected to handle the wheel or to act as lookout. He is in charge of a "watch" the general nature of which is well understood. What an "operator" of a small vessel is, is not so clarified by tradition.

Our regulations do not help in clarification such as to define what is or is not misconduct. In 46 C.F.R. 10-20.3 it is made mandatory that an applicant for license as a "motorboat operator" shall have at least "one year's experience in the operation of

motorboats." 46 C.F.R. 187.25-5 requires that an applicant for a license as "ocean operator" must have at least "one year's service as a licensed motorboat operator of motorboats carrying six or less passengers for hire on ocean or coastwise waters or, two years deck department service in the operation of ocean or coastwise motorboats or small motor vessels." It seems to me that a realistic appraisal of all this is that a distinction must be made between a person who is actually operating a motorboat and a person who is required to be a licensed officer under 46 C.F.R. 10.05. The regulations at 46 C.F.R. 10.20 and 46 C.F.R. 187.25 contemplate that the applicant for the licenses must show service in "operation" of the vessels to be covered by the license. I see therefrom that a person may be an "operator" of a motorboat subject to 46 U.S.C. 526 et seq. or an "operator" of a motorboat subject to 46 U.S.C. 390, et seq. without being the licensed person required to be aboard the vessel by law or regulation. Since service in operation of a vessel subject to 46 U.S.C. 526 et seq. and 390 et seq. implies service as an unlicensed operator, I cannot hold as a matter of law that only a licensed operator may be in charge of the operation of a motorboat carrying passengers for hire under 46 U.S.C. 526 et seq. and 46 U.S.C. 390 et seq.

The next question raised is whether the certificate of inspection has any bearing upon the terms of operation of a vessel by a licensed operator. the certificate has no force or effect on an operator as does 46 U.S.C. 673 upon a licensed officer since, as I have pointed out above, the vessel was of 100 or less gross tons. The certificate of inspection does not purport to limit the service of a licensed operator to any set number of hours; it limits only the use of the vessel. Under existing regulations, therefore, an "operator" could move from one vessel limited to twelve hours of operation to another vessel similarly limited to twelve hours of operation without violation of his license or the certificate of inspection of either vessel.

It is therefore obvious that the Examiner's effort to import the twelve hour clause of the certificate of inspection of the vessel into some sort of limitation on Appellant's license to operate the vessel is misplaced.

I need not speculate as to the ways in which Appellant could have committed misconduct while serving under authority of his license. I say here only that as to the matters discussed so far there has been no showing of "misconduct" cognizable under R. S. 4450.

It is obvious that an "operator", under the existing laws and regulations, can operate for twenty-four hours a day on one vessel and another, regardless of what the certificate of inspection for

the vessels may require.

The next question raised before me is whether a twelve hour limitation on the use of a vessel imposes upon the one licensed operator assigned to the vessel pursuant to a certificate of inspection a duty to be in active supervision of the vessel at all times. I have already mentioned that the limitation of twelve hours on the operation of a vessel does not limit the work of an operator of a vessel to twelve hours. The operator may go to another vessel so limited and operate it. More important is the question of whether the certificate of inspection and the issued license of the operator require him to be in supervision and "control" of the vessel at all times.

Without extensive study of the matter, leading possibly to new regulations, I cannot say that what Appellant did in this case amounted as a matter of law to misconduct as considered under R. S. 4450.

Had Appellant been found to have been intoxicated or asleep I would have little difficulty in finding his actions to have constituted misconduct. Had the vessel made its way into a collision or other marine casualty I would have no hesitancy about finding negligence.

But the fact that the vessel was certificated for twelve hours' service with one operator does not necessarily mean that that operator must be in direction and control, or even in immediate supervision, for the entire twelve hours. It obviously cannot mean that.

Neither the Investigating Officer nor the Examiner seems to be disturbed by the fact that Appellant was on the main deck talking with the party and not on the bridge when the deckhand took the vessel out of the harbor. Nor does either appear to have been disturbed by the fact that Appellant was apparently on deck tending to the placement of fishing lines when the first fishing site was reached, with the deckhand alone handling the vessel. The gravamen of Appellant's offense seems to have been that for extended periods of time he was lying on the deck of the wheel house, directly alongside the steersman, neither intoxicated nor asleep. In the open waters of the ocean he was more immediately available to his deckhand than he was when he was on deck talking with the party of patrons as the deckhand guided the vessel out of a harbor.

I cannot hold as a matter of law, in the absence of some clearly defined standard, that this conduct is, without more, <u>per se</u> misconduct.

II

The remaining specification found proved alleges that Appellant used foul and abusive language to certain passengers. Appellant argued at hearing that the language used was "man talk", of the kind well known to the principal witness who was a veteran of military service, and was not uttered in the presence of females, of whom there was none aboard.

In this respect, I must say that the backgrounds of life experience of persons involved are not of great significance here. A paying passenger, as each of the party aboard the vessel was, is entitled to courteous conduct on the part of the entrepreneur who seeks his money, whether the passenger be male or female, young or old. A licensed operator has a duty not to be personally offensive to his patrons. The acts did in fact constitute misconduct.

I still have a problem however, as to this offense. The record raises grave doubts that the passengers were really offended by the misconduct.

The record is clear that the investigation was convened in this case on the written complaint of the person who chartered the vessel and who was the host of the other passengers who were his employees. The charges predicated on this complaint were served on Appellant on 14 September 1970. The charges as served did not contain a specification dealing with foul and abusive language. The hearing opened on notice on 26 October 1970. It was not until 7 December 1970, when the witnesses appeared that the specification alleging foul and abusive language was added by oral motion during the course of proceedings. The pleadings were never even reduced to writing. I do not say that the procedure followed was error; in fact I distinctly approve of it. But the circumstances leave me with doubt about the advisability of upholding a decision based only on an afterthought. If this is the only misconduct that can be found it seems clearly to me that it is a case of de minimis, and it is better to dismiss the matter completely than to undertake the gyrations needed to sift and sort how much of the Examiner's original order could be attributed to the foul and abusive language finding or to remand the case to the examiner for reassessment of his order in light of this decision.

III

This decision and past events actually moot Appellant's only ground for appeal but I wish to comment on it anyway. Appellant complains that the delay in his hearing timed the order of suspension to hurt him during his operating season.

I have specifically approved an examiner's tailoring his order to seasonal activity. See Decisions on Appeal Nos. 1792 and 1793. That was not done in this case, however. The timing of the Examiner's order was purely fortuitous. This is not a case in which the Examiner, without explanation, delayed issuance of his decision for months after a one-day hearing. In the instant case the delay in hearing was consented to be Appellant for his own good reasons; he had charters to fulfill which more expeditious hearing might have interfered with. There was no unreasonable and unexplained delay in the issuance of the Examiner's decision. In fact, the weighty problem which he faced and the thought that he obviously gave to it confirm the belief that the decision was made and uttered with dispatch rather than delay. The fact that I ultimately disagree with the Examiner, after review of the whole record and consideration of the same problems that faced him, only reinforces the belief that a difficult case was disposed of, at the hearing level, with due attention and with the utmost dispatch consistent with judicious reasoning.

I further take official notice that Appellant asked for a temporary license when he filed his appeal and that the Examiner authorized the issuance of such a license. It was Appellant's own decision not to take the temporary license, again for his own reasons.

ORDER

The findings of the Examiner are SET ASIDE. The charges and specifications are DISMISSED.

T. R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 24th day of August 1972.

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